Supreme Court, U.S.
FILED
MAR 14 2005
OFFICE OF THE CLERK

No. 04-831

IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY and
MISSISSIPPI DEPARTMENT OF TRANSPORTATION,
Petitioners,

v.

KELLI SMALLWOOD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether it is proper for a diverse defendant to allege fraudulent joinder to defeat diversity jurisdiction on grounds that can be asserted by diverse and non-diverse defendants alike.

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INTRODUCTION

The matter before the Court concerns the doctrine of fraudulent joinder to defeat diversity jurisdiction. The fraudulent joinder doctrine provides that, in cases removed from state court to federal court in diversity jurisdiction, *see* 28 U.S.C. § 1332; *Id.* § 1441, the citizenship of diversity-defeating defendants can be disregarded in limited circumstances.[1] Specifically, the citizenship of a non-diverse defendant will be disregarded when there has been outright fraud in the pleading of jurisdictional facts or when there is no possibility that a plaintiff can establish a claim for relief against a non-diverse defendant under relevant state law. *See generally* James F. Archibald III, Note, *Reintroducing "Fraud" to the Doctrine of Fraudulent Joinder*, 78 Va. L. Rev. 1377, 1387 (1992) (collecting cases).

The core principles of the fraudulent joinder doctrine were enunciated by the Court in a handful of decisions issued almost a century ago. A defendant is fraudulently joined when that defendant has "no real connection with the controversy." *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 152 (1914). Correspondingly, fraudulent joinder does not exist where "[t]here is nothing more than a traverse of the cause of action" against a non-diverse defendant, and in such a case "the plaintiff has a right of action under the law of the state and to insist upon [the non-diverse defendant's] presence as a real defendant." *Chicago, Rock Island & Pac. Ry. Co. v. Whiteaker*, 239 U.S. 421, 425 (1915). *See also Huffman v. Baldwin*, 82 F.2d 5, 8 (8th Cir. 1936) (when allegations of fraudulent joinder

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1. As the Court knows, diversity jurisdiction generally requires complete diversity of citizenship, that is, no plaintiff can be a citizen of the same state as any defendant. *See Carden v. Arkoma Assocs.*, 494 U.S. 185, 187 (1990) (citing *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806)).

amount to a "general denial" of wrongdoing that "affect[s] all defendants" and "involve[s] the merits of the controversy," such allegations "ha[ve] no tendency to show any fraudulent joinder of resident defendants to prevent removal").[2] Put another way, when a claim of fraudulent joinder merely "indicate[s] that the plaintiff's case [is] ill founded as to [both diverse and non-diverse] defendants," it goes to "the merits of the [cause of] action . . . and not to the joinder." *Cockrell*, 232 U.S. at 153.

In the more than eighty years that have passed since the Court last squarely addressed the subject of fraudulent joinder, *see Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 96-99 (1921), the contours of the doctrine have blurred and its scope has expanded dramatically. It is now commonplace for federal courts to find fraudulent joinder based on what amounts to a traverse of a plaintiff's cause of action, that is, an allegation of fraudulent joinder that simply attacks the merits of the plaintiff's claim for relief against diverse and non-diverse defendants alike. *See, e.g., Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263, 268 n.3 (5th Cir. 2001) (holding that a non-diverse defendant was fraudulently joined because the plaintiffs' claims against that defendant were preempted by the Texas products liability statute; the court conceded that the same grounds for fraudulent joinder also were dispositive of the plaintiffs' claims against the removing defendants as well, but

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2. In common-law pleading, when a defendant denied a plaintiff's allegations this was termed a "traverse" of those allegations. *See McGann v. Kelly*, 891 F. Supp. 128, 131 n.1 (S.D.N.Y. 1995). A "cause of action" is of course the "group of operative facts giving rise to one or more bases for suing" or, differently put, "a factual situation that entitles one person to obtain a remedy in court from another person." Black's Law Dictionary (8th ed. 2004). It is the ancestor of the modern "claim for relief." Fed. R. Civ. P. 8(a). *See also* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1216 (2004).

insisted, "[T]he jurisdictional question is inseparable from the merits.").

The en banc decision of the court below refused to permit Petitioner Illinois Central Railroad Company ("ICR") to assert fraudulent joinder on the grounds that the claims of Respondent Kelli Smallwood against Petitioner Mississippi Department of Transportation ("MDOT") are preempted by federal law, a defense equally available to both ICR and MDOT. Contrary to the arguments of ICR and MDOT in support of a grant of a writ of certiorari, the decision of the court below is not in conflict with decisions of this Court or decisions from sister circuits. Instead, the decision of the court below is an important and valuable step toward restoring judicial federalism by recovering the true meaning of the fraudulent joinder doctrine as set forth in the decisions of this Court.

STATEMENT OF THE CASE

This case arises from a collision between a car driven by Ms. Smallwood and a train owned and operated by ICR at a railroad crossing in Florence, Mississippi. Ms. Smallwood filed suit for negligence against ICR and MDOT in the Circuit Court of Hinds County, Mississippi. *See Smallwood v. Illinois Cent. R.R. Co.*, 342 F.3d 400, 401 (5th Cir. 2003). She alleged that the signalization at the Florence crossing was inadequate because MDOT negligently failed to install automatic gates at the crossing. *See id.* Ms. Smallwood alleged also that, after approval of federal funds for automatic gates at the Florence crossing by the Federal Highway Administration, both ICR and MDOT negligently failed to install the gates at the crossing within a reasonable time. *See id.*

ICR removed the case to the United States District Court for the Southern District of Mississippi in diversity jurisdiction, contending that MDOT, a non-diverse party, had been fraudulently joined to defeat diversity jurisdiction. *See Smallwood*, 342 F.3d at 401-02.[3] ICR asserted that Ms. Smallwood could establish no claim against MDOT under Mississippi law because her claims against the agency are conflict-preempted by the Federal Railroad Safety Act of 1970, 49 U.S.C. §§ 20101-20153 ("FRSA"). *See* 342 F.3d at 401-02.[4] Ms. Smallwood moved for remand of her case to state court. *See id.* at 402.

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3. MDOT, as an alter ego of the State of Mississippi, is not a citizen of a state for diversity purposes. *See Moor v. County of Alameda*, 411 U.S. 693, 717 (1973); *Tradigrain, Inc. v. Mississippi State Port Auth.*, 701 F.2d 1131, 1132 (5th Cir. 1983); *Brady v. Michelin Reifenwerke*, 613 F. Supp. 1076, 1078-79 (S.D. Miss. 1985).

4. As the Court knows, "conflict preemption" occurs when federal law extinguishes a plaintiff's state-law claim. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). This is in contrast of course to "complete preemption," wherein a federal remedy completely displaces any remedy under state law so as to permit removal of a claim nominally brought under state law to federal court pursuant to 28 U.S.C. §§ 1331 and 1441. *See Taylor*, 481 U.S. at 63-64. *See also Rivet v. Regions Bank of La.*, 522 U.S. 470, 475-76 (1998). The only basis for federal subject matter jurisdiction that ICR has ever asserted in this case is diversity; at no time has ICR asserted that the FRSA completely preempts state law so as to permit removal. *See* 14C Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Joan E. Steinman, *Federal Practice & Procedure* § 3733 (1998 & Supp. 2004) (explaining that under 28 U.S.C. § 1653 a notice of removal cannot be amended to allege an entirely new basis for federal jurisdiction more than thirty days after removal) (collecting cases). Also, the issue of whether the FRSA completely preempts state law is not properly before the Court because it was not passed on by the court below, *see FTC v. Travelers Health Ass'n*, 362 U.S. 293, 298 n.4 (1960), and because it is not within the scope of the question presented by the petition for a writ of certiorari currently before the Court. *See Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 431-32 (1997).

The district court denied remand, finding that MDOT had been fraudulently joined due to FRSA preemption of Ms. Smallwood's claims against the agency. *See Smallwood*, 342 F.3d at 402. Thereafter, the district court granted summary judgment for ICR on grounds of FRSA preemption. *See id.* In so doing, the district court concluded that, in view of its holding that Ms. Smallwood's claims against MDOT are preempted, it was bound by the "law-of-the-case" doctrine to find that the her claim against ICR is preempted as well. *See Smallwood v. Illinois Cent. R.R. Co.*, 385 F.3d 568, 572, 574 (5th Cir. 2004).[5]

On appeal a panel of the United States Court of Appeals for the Fifth Circuit vacated the district court's judgment and ordered the district court to remand Ms. Smallwood's case to state court for lack of subject matter jurisdiction. *See Smallwood*, 342 F.3d at 402, 408. The panel held that ICR's claim of fraudulent joinder "manifestly went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants." *Id.* at 404 (quoting *Cockrell*, 232 U.S. at 153). The panel held further, "[W]here there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses." *Id.* at 405 (quoting *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 113 (3d Cir. 1990)). "Instead, that is a merits determination which must be made by the state court." *Id.* Accordingly, the panel rejected ICR's attempt to assert fraudulent joinder on grounds

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5. The "law-of-the-case" doctrine provides of course that a court, once having decided an issue, generally will decide the issue the same way at all later stages of a proceeding. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-17 (1988).

that could be asserted by diverse and non-diverse defendants alike. *See id.* at 408.

On December 19, 2003, the court of appeals ordered rehearing en banc in Ms. Smallwood's case. *See Smallwood v. Illinois Cent. R.R. Co.*, 355 F.3d 357, 357-58 (5th Cir. 2003). On September 10, 2004, the en banc court of appeals upheld the panel's decision and rejected ICR's claim of fraudulent joinder based on grounds that could be asserted by both ICR and MDOT, the diversity-defeating party. The en banc court said, "The doctrine of improper joinder . . . entitle[s] a defendant to remove to a federal forum unless an in-state defendant has been 'properly joined.' Since the purpose of the improper joinder inquiry is to determine whether or not the in-state defendant was properly joined, the focus of the inquiry must be on the joinder, not the merits of the plaintiff's case." *Smallwood*, 385 F.3d at 573.[6]

The court held, "A claim of improper joinder by

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6. In *Smallwood* the en banc court eschewed the traditional term "fraudulent joinder" in favor of the term "improper joinder." *See* 385 F.3d at 571 & n.1. Where the removal statute authorizes removal of any action in which "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought," 28 U.S.C. § 1441(b), the court reasoned that the term "improper joinder" is more consistent with the statutory language. *See* 385 F.3d at 571 n.1. *See also Lewis v. Time Inc.*, 83 F.R.D. 455, 460 (E.D. Cal. 1979) (explaining that the term "fraudulent joinder" is something of a misnomer: "'Fraudulent joinder' is a term of art, it does not reflect on the integrity of plaintiff or counsel but is merely the rubric applied when a court finds either that no cause of action is stated against the nondiverse defendant, or in fact no cause of action exists.") (citation omitted). However, the en banc court advised that there is "no substantive difference" between the terms "fraudulent joinder" and "improper joinder." 385 F.3d at 571 n.1. This brief employs the term "fraudulent joinder," in deference to the Court's decisions concerning the doctrine.

definition is directed toward the joinder of the in-state party, a simple but easily obscured concept. The party seeking removal bears a heavy burden of proving that the joinder of the in-state party was improper." *Smallwood*, 385 F.3d at 574. The court continued,

> [W]hen, on a motion to remand, a showing that compels a holding that there is no reasonable basis for predicting that state law would allow the plaintiff to recover against the in-state defendant necessarily compels the same result for the nonresident defendant, there is no improper joinder; there is only a lawsuit lacking in merit. In such cases, it makes little sense to single out the in-state defendants as "sham" defendants and call their joinder improper. In such circumstances, the allegation of improper joinder is actually an attack on the merits of plaintiff's case as such – an allegation that . . . "the plaintiff's case [is] ill founded as to all the defendants."

Id. (quoting *Cockrell*, 232 U.S. at 153).

The en banc court held that "the basis of [ICR's] contention that Smallwood could not recover went, in fact, to the entire case, although it was first directed to Smallwood's claims against MDOT. Then, with jurisdiction secured, and with all the force of the 'law of the case,' this same preemption was directed to the merits of Smallwood's claims against the railroad." *Smallwood*, 385 F.3d at 574. However, the court went on to say, "[T]he burden on the removing party is to prove that the joinder of the in-state parties was improper – that is, to show that sham defendants were added to defeat jurisdiction. A showing that the plaintiff's case is barred as to all defendants

is not sufficient." *Id.* at 575.[7] Finding that ICR's claim of fraudulent joinder based on FRSA preemption of Ms. Smallwood's claims against MDOT was "equally dispositive of all defendants," the en banc court held "diversity is not complete" and ordered Ms. Smallwood's case remanded to state court for lack of jurisdiction. *Id.* at 575, 576.

ARGUMENT

I. The Decision of the Court Below Is Consistent with Precedent of this Court.

This Court has long held, as the court below did, that fraudulent joinder is not established merely by attacking the merits of a plaintiff's claim for relief against diverse and non-diverse defendants alike. Such determinations are for a state court to make. Instead, fraudulent joinder is proven by showing that a plaintiff cannot recover against a non-diverse defendant because that defendant has no connection to a controversy.

In *Southern Railway Co. v. Lloyd*, 239 U.S. 496 (1916), the Court rejected a claim of fraudulent joinder that amounted merely to an assertion that the plaintiff could not establish a claim under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 ("FELA"), against a non-diverse defendant, a contention that, if true, was equally dispositive of the plaintiff's claim against the defendant seeking removal. *Lloyd* was a suit

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7. The en banc court offered examples of certain kinds of facts that, if proved by summary evidence, establish fraudulent joinder: "For example, the in-state doctor defendant did not treat the plaintiff patient, the in-state pharmacist defendant did not fill a prescription for the plaintiff patient, a party's residence was not as alleged, or any other fact that easily can be disproved if not true." *Smallwood*, 385 F.3d at 574 n.12.

under FELA by a railroad engineer who was injured on the job against his employer, the Southern Railway Company ("Southern"), and the North Carolina Railroad Company, from which Southern had leased the track where the plaintiff was injured. *See* 239 U.S. at 497-98. Southern attempted to remove the case to federal court, asserting that the plaintiff could establish no claim under FELA against the North Carolina Railroad Company, which defeated diversity, because the plaintiff was not engaged in interstate commerce when he was injured and thus had no claim against the lessor railroad under FELA. *See id.* at 498-99. The Court found that Southern had failed to show fraudulent joinder. "In no case can the right of removal be established by a petition to remove which amounts simply to a traverse of the facts alleged in the plaintiff's petition, and in that way undertaking to try the merits of a cause of action, good upon its face." *Id.* at 500.

In *Chesapeake & Ohio Railway Co. v. Cockrell* the Court rejected a claim of fraudulent joinder in a wrongful death suit against a railroad company and two non-diverse agents of the railroad, an engineer and a fireman, who were alleged negligently to have killed a woman at a railroad crossing. *See* 232 U.S. at 150. The railroad attempted to remove the case to federal court. The railroad's petition for removal, the Court noted, "[did] not deny[ ] that the engineer and fireman were in the employ of the company, or that they were operating the train when it struck and injured the intestate." *Id.* at 150-51. However, the railroad insisted that the plaintiff's allegations of negligence against the non-diverse defendants were "false and untrue" and that "none of the charges of negligence on the part of the engineer or fireman could be sustained on the trial." *Id.* at 151. The Court observed that the railroad's allegations, if true, "may have disclosed an absence of good faith on the part of the plaintiff in bringing the action at all." *Id.* at 153. However, the Court continued, they "did not show a fraudulent

joinder of the engineer and fireman." *Id.*

Because the railroad had failed to present any evidence that the engineer and fireman were not operating the train when the accident took place, the Court found that the railroad had failed to show fraudulent joinder. "With the allegation that [the engineer and fireman] were operating the train which did the injury standing unchallenged, the showing amounted to nothing more than a traverse of the charges of negligence, with an added statement that they were falsely or recklessly made and could not be proved as to the engineer or fireman." *Cockrell*, 232 U.S. at 153. The Court concluded that "this was not such a showing as to engender or compel the conclusion that the two employees were wrongfully brought into a controversy which did not concern them." *Id.* The Court held, "As [the engineer and fireman] admittedly were in charge of the movement of the train, and their negligence was apparently the principal matter in dispute, the plaintiff had the same right, under the laws of Kentucky [where the accident took place], to insist upon their presence as real defendants as upon that of the railway company." *Id.* "We conclude, therefore, that the petition for removal was not such as to require the state court to surrender its jurisdiction." *Id.* at 153-54.[8]

Finally, in *Illinois Central Railroad Co. v. Sheegog*, 215 U.S. 308 (1909), the Court again rejected a claim of fraudulent joinder that amounted merely to a traverse of a plaintiff's cause of action against diverse and non-diverse defendants. In *Sheegog* the estate of a railroad engineer killed in a train derailment accident brought suit for negligence against ICR, the

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8. Until 1948 removal was effected by petitioning the state court in which an action was pending for leave to remove the action to federal court. *See generally* 20 Charles Alan Wright & Mary Kay Kane, *Federal Practice & Procedure Deskbook* § 42 (2002).

engineer's employer. *See id.* at 315. Also named as defendants were the Chicago, St. Louis, and New Orleans Railroad Company, from which ICR leased the track where the derailment occurred, and the conductor of the train on which the engineer was working when he was killed. *See id.* The plaintiff alleged that the lessor railroad and the lessee railroad had been negligent in maintaining the roadbed and track where the derailment occurred. *See id.* The plaintiff alleged also that the derailment had occurred because ICR had been negligent in maintaining its train and in operating the train on tracks that were in disrepair, and that the conductor had been negligent in ordering and directing the management of the train. *See id.*

ICR sought to remove the case, contending that the lessor railroad and the conductor, both of whom defeated diversity, had been fraudulently joined. The court concluded that ICR had failed to show fraudulent joinder as to the lessor railroad. The Court observed that ICR's petition for removal "admitted the lease" but asserted that "the charge of joint negligence against the lessor and lessee in causing the wreck . . . was fraudulent and knowingly false." *Sheegog*, 215 U.S. at 315. However, the Court noted, as a matter of law a lessor is jointly liable for injury caused through the negligence of a lessee. *See id.* at 317-18. Thus, the Court concluded, to hold that the plaintiff's claim for relief against the lessor railroad was fraudulent would be tantamount to holding "that the charge against the alleged immediate wrongdoer, the Illinois Central Railroad itself, was fraudulent and false." *Id.* at 316. *See also Whiteaker*, 239 U.S. at 423-25 (in a suit against a railroad company and a conductor for injuries suffered when the conductor threw the plaintiff off a moving train, rejecting the railroad's argument that the conductor was fraudulently joined because he was elsewhere on the train when the injury giving

rise to the case occurred).[9]

The meaning of the Court's fraudulent joinder jurisprudence is that a defendant cannot establish fraudulent joinder by controverting the merits of a plaintiff's claim for relief. By the same token, the Court has held that fraudulent joinder can be proven through summary evidence showing that a non-diverse defendant has no real connection to a controversy. For example, in *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176 (1907), a plaintiff sued his employer, the National Enameling and Stamping Company ("National"), and a non-diverse co-employee, George Wettengel, for injury caused by a machine that allegedly was defectively designed. *See id.* at 178-79. National asserted that Wettengel was fraudulently joined and submitted in support of the claim uncontradicted affidavits by Wettengel and the chief engineer of the company showing that Wettengel was merely a draftsman with no responsibility for designing the machine that caused the injury at issue in the case. *See id.* at 183-84. The Court said, "[i]n view of this testimony and the apparent want of basis for the allegations of the [removal] petition as to Wettengel's relations to the plaintiff, and the uncontradicted evidence as to his real connection with the company, we think . . . he was joined for the purpose of defeating the right of the corporation

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9. It is important to note that in both *Lloyd* and *Sheegog* the defendants who were found to defeat diversity were not agents of the defendant seeking removal. In fact, in *Sheegog* the Court pointed out that the plaintiff's claim against the conductor likely was barred by the "fellow-servant" rule, the common-law doctrine that an employer is not liable for an employee's injuries caused by a negligent co-worker, although the Court did not reach the issue because, for the reason discussed supra, it was unnecessary to do so. *See* 215 U.S. at 317. Thus, in this case ICR and MDOT are wrong in arguing that fraudulent joinder cannot be asserted on grounds common to diverse and non-diverse defendants only in those cases where the liability of the defendant seeking removal is vicarious.

to remove the case to the Federal court." *Id.* at 185. *See also Wilson*, 257 U.S. at 94, 96-98 (in a suit for personal injuries by a plaintiff against his employer and a non-diverse co-employee, holding that the case was properly removed to federal court where the plaintiff failed to controvert allegations in a verified removal petition that the co-employee "was not present when the plaintiff's injuries were received, and did no act or deed which caused or contributed to such injuries").

In this case ICR never argued or produced evidence to show, for example, that MDOT does not exist or that, if it does exist, the agency has no responsibility for safety devices at railroad crossings in Mississippi. Instead, ICR merely argued that Ms. Smallwood's claims against MDOT are preempted by the FRSA. Whatever the merits of ICR's preemption argument, it is not a proper basis for a claim of fraudulent joinder. As the court below held, "When the only proffered justification for [fraudulent] joinder is that there is no reasonable basis for predicting recovery against the in-state defendant, and that showing is equally dispositive of all defendants rather than to the in-state defendants alone, the requisite showing has not been made." *Smallwood*, 385 F.3d at 575.

II. There Is No Circuit Split on the Question Presented.

The decision of the court below does not conflict with *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998), and *LeBlang Motors, Ltd. v. Subaru of America, Inc.*, 148 F.3d 680 (7th Cir. 1998), as ICR and MDOT argue. In *Ritchey* the court recognized the general rule established by *Cockrell* and other precedent of this Court discussed supra that a claim of fraudulent joinder cannot be based on grounds that can be asserted by diverse and non-diverse defendants alike. However, the *Ritchey* court concluded that because under California law

the statute of limitations is a unique defense that does not address the merits of a plaintiff's claim, it does not violate the strictures of *Cockrell* for a defendant to assert fraudulent joinder based on a California limitations defense applicable to claims against diverse and non-diverse defendants alike. As for *LeBlang*, in that case the issues presented by Ms. Smallwood's appeal were not briefed, argued, or considered by the court, and thus *LeBlang* is not precedential as those issues.

Turning first to *Ritchey*, in that case the court recognized that "[t]here is a distinction" between a complete lack of a claim against allegedly fraudulently-joined defendants and "an inquiry as to whether those defendants could propound defenses to an otherwise valid cause of action." 139 F.3d at 1318. In the latter instance, the court acknowledged, the claim of fraudulent joinder goes to "the merits of the action as an entirety, and not to the joinder; that is to say, it indicate[s] that the plaintiff's case [is] ill founded as to all the defendants." *Id.* (quoting *Cockrell*, 232 U.S. at 153). *See also Murakami v. E.I. DuPont De Nemours & Co.*, 191 F.3d 460, 1999 WL 701902, at *3 (9th Cir. 1999); *Lovell v. Bad Ass Coffee Co. of Haw.*, 103 F. Supp. 2d 1233, 1237 (D. Haw. 2000). However, the *Ritchey* court concluded, under California law a limitations defense does not address the merits of a case. The court said, "California has emphasized the fact that the statute of limitations is a kind of procedural bar, and not one which relates to the merits of the case." 139 F.3d at 1319 (citing, inter alia, *Piazza Props., Ltd. v. Department of Motor Vehicles*, 138 Cal. Rptr. 357, 360 (Cal. Ct. App. 1977)). "In fact, California has pointed out that a judgment based on the statute of limitations regarding a cause of action in one suit is not necessarily res judicata in a second suit, which pleads a different cause of action based on the same core of underlying facts." *Id.* (citing *Koch v. Rodlin Enters.*, 273 Cal. Rptr. 438, 441-42 (Cal. Ct. App. 1990)).

The principle the *Ritchey* court invoked is of course simply the common-law rule that a statute of limitations runs against a remedy, not a right, so that the running of a limitations period does not necessarily preclude a new suit to enforce the right. "The general rule is that a statute of limitations bars, or runs against, the remedy and does not extinguish or impair the right, obligation, or cause of action." 54 C.J.S. *Limitations of Actions* § 11 (1955 & Supp. 2004) (collecting cases). *See also Koch*, 273 Cal. Rptr. at 441-42 (a dismissal on limitations grounds by a foreign court is not res judicata in a new action to enforce the same legal right in California court); *Piazza Props.*, 138 Cal. Rptr. at 360 (noting that "[a] statute of limitations typically is procedural only, affecting the remedy, not the substantive right or obligation").[10]

In sum, *Ritchey* does not conflict with the decision of the court below. The *Ritchey* court recognized the general rule that fraudulent joinder cannot be asserted on grounds that can be asserted by diverse and non-diverse defendants alike. However, the court created an exception to that rule based on what it saw as the unique nature of a statute of limitations defense under California law. The court below seems to have

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10. The *Ritchey* court seems also to have relied upon the principle that the statute of limitations is a defense personal to a party entitled to plead it and thus can be waived if not pleaded. *See* 139 F.3d at 1319 (citing *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992), and *O'Neil v. Spillane*, 119 Cal. Rptr. 245, 252 (Cal. Ct. App. 1975)). In fact, it is precisely because a limitations defense is personal to the defendant entitled to plead it that such a defense cannot be asserted by a defendant on behalf of a co-defendant. *See Goldberg, Bowen & Co. v. Demick*, 247 P. 261, 263 (Cal. Dist. Ct. App. 1926). *See also* 51 Am. Jur. 2d *Limitation of Actions* § 69 (1964 & Supp. 2004) ("A plea of the statute of limitations is a personal defense, and generally cannot be asserted for someone else.") (footnote omitted) (collecting cases). Thus, under California law, in *Ritchey* the removing defendant was not entitled to assert a defense of the statute of limitations on behalf of non-diverse co-defendants.

believed mistakenly that its en banc decision is in conflict with the *Ritchey* decision. *See Smallwood*, 385 F.3d at 575 n.21. However, this misapprehension is merely a commentary upon the tortured and byzantine reasoning of the *Ritchey* court. *See Ritchey*, 139 F.3d at 1320 (admitting that the result in that case is "anomal[ous]" and "peculiar"). *See also Shadie v. Aventis Pasteur, Inc.*, 254 F. Supp. 2d 509, 519 (M.D. Pa. 2003) (stating that *Ritchey* is "not persuasive"). In any event, whatever the merits of the *Ritchey* court's reasoning, its decision does not establish the existence of a circuit split.

Finally, *LeBlang* does not conflict with the decision of the court below. In *LeBlang*, an action for fraud by a former automobile dealer against an automobile manufacturer and two of the manufacturer's employees, the court found that the employees, who defeated diversity, had been fraudulently joined because the statute of limitations had run on the plaintiff's claim against the employees. *See* 148 F.3d at 690-92. The limitations period applicable to the plaintiff's claims against the employees was the same as the limitations period applicable to the plaintiff's claims against the manufacturer. *See id.* at 690. ICR and MDOT claim that *LeBlang* "implicitly" conflicts with the decision of the court below. What ICR and MDOT mean of course is that nothing in the *LeBlang* decision or in the briefing by the parties to *LeBlang* addresses the issues presented by Ms. Smallwood's appeal.[11] Thus, *LeBlang* is not a precedent as to those issues and is not in conflict with the decision of the court below.

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11. The brief of the appellants and the reply brief of the appellants in *LeBlang* are available on Westlaw at 1997 WL 33623408 and 1997 WL 33623409, respectively. As the briefing from *LeBlang* shows, the issues briefed and argued in Ms. Smallwood's appeal were not briefed and argued in *LeBlang*.

As the Court knows, a judicial opinion never decides an issue "implicitly." "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925)). *See also United States v. Mitchell*, 271 U.S. 9, 14 (1926) ("It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been decided merely because it existed in the record and might have been raised and considered."); *United States v. Daniels*, 902 F.2d 1238, 1241 (7th Cir. 1990) ("Judicial assumptions concerning, judicial allusions to, and judicial discussions of issues that are not contested are not holdings.").

The rule that a judicial opinion is authority only for those issues that it actually decides applies with particular force when an issue is, as in this case, jurisdictional. "[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984) (quoting *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974)). Simply put, "drive-by jurisdictional rulings . . . have no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). *See also Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) ("[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect."); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994) (decisions in which the Court's jurisdiction was not challenged are not precedent as to a jurisdictional question, and when the question is squarely presented to the Court it may be treated as open); *United States v. More*, 7 U.S. (3 Cranch) 159, 172 (1805) ("No question was made, in [a prior] case, as to . . . jurisdiction. It passed *sub silentio*, and the court does not consider itself as

bound by that case."); *Glidden v. Chromalloy Am. Corp.*, 808 F.2d 621, 625 (7th Cir. 1986) ("When a court resolves a case on the merits without discussing its jurisdiction to act, it does not establish a precedent requiring similar treatment of other cases once the jurisdictional problem has come to light.").

Thus, *LeBlang* is not a precedent as to the issues presented by Ms. Smallwood's appeal. Indeed, as *Daniels* and *Glidden* make clear, at such time as the issues presented by Ms. Smallwood's appeal are squarely presented to the United States Court of Appeals for the Seventh Circuit, that court will not treat *LeBlang* as a precedent as to those issues. Accordingly, *LeBlang* does not establish the existence of a circuit split with respect to the decision of the court below. Neither *Ritchey* nor *LeBlang* are in conflict with the en banc decision of the court below.[12]

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12. For the foregoing reasons it should be clear that, contrary to what ICR and MDOT argue, there is no conflict between, on the one hand, *Ritchey* and *LeBlang* and, on the other hand, the decision of the United States Court of Appeals for the Third Circuit in *Boyer v. Snap-on Tools Corp.* To the extent ICR and MDOT argue that the en banc court's decision contravenes earlier Fifth Circuit authority, they are wrong. As the court below recognized in its en banc decision, the issues presented by Ms. Smallwood's appeal were never considered before by the court below, so that, as with *LeBlang*, prior decisions of the court are not precedential as to those issues. *See Smallwood*, 385 F.3d at 575. In any event, it certainly is within the power of a federal court of appeals sitting en banc to overrule its own precedents in order to ensure consistency of the court's decisions with those of this Court. *See United States v. Zuniga-Salinas*, 952 F.2d 876, 877-78 (5th Cir. 1992). Of course, given the deep division in the court below as to the result in Ms. Smallwood's case (seven of the sixteen judges who heard the case en banc dissented, turning in no fewer than three written dissents), it is questionable to what degree, if any, the en banc *Smallwood* decision has clarified the law. *See Gilliard v. Oswald*, 557 F.2d 359, 359 (2d Cir. 1977) (Kaufman, C.J., concurring) (observing that "[t]he proliferation of opinions which is not rare in an en banc decision . . . usually obfuscates rather than clarifies.").

III. The Decision of the Court Below Is Consistent With Principles of Judicial Federalism.

The decision of the court below is in harmony with this Court's precedent and with the decisions of sister courts of appeals. A determination about the merits of Ms. Smallwood's claims for relief is one that only a state court can make. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co.*, 523 U.S. at 94 (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). *See also Smallwood*, 385 F.3d at 576 ("When a defendant removes a case to federal court on a claim of [fraudulent] joinder, the district court's first inquiry is whether the removing party has carried its heavy burden of proving that the joinder was improper. Indeed, until the removing party does so, the court does not have the authority to do more; it lacks the jurisdiction to dismiss the case on its merits. It must remand to the state court.").

The en banc court's decision is consistent also with the policies traditionally grouped under the rubric of judicial federalism. The federal courts are courts of limited jurisdiction, and removal of cases in diversity jurisdiction must be construed narrowly to ensure that the proper balance of federal-state power is maintained. *See Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002); *Snyder v. Harris*, 394 U.S. 332, 340 (1969); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *Healy v. Ratta*, 292 U.S. 263, 270 (1934). *See also Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (the Court recognizes a "presumption of concurrent [state and federal] jurisdiction," which can be rebutted only "by an explicit statutory directive, by

unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests"). The primary mission of the federal courts is to adjudicate matters involving federal law and national interests, not state law and local interests, and the limited resources of the federal judiciary are to be husbanded toward fulfillment of that mission. Limitation of diversity jurisdiction "reliev[es] the federal courts of the overwhelming burden of . . . business that intrinsically belongs to the state courts . . . in order to keep them free for their distinctive federal business." *City of Indianapolis v. Chase Nat'l Bank of City of N.Y.*, 314 U.S. 63, 76 (1941). *See also* Judicial Conference of the United States, *Long Range Plan for the Federal Courts*, 166 F.R.D. 49, 66 (1995) ("The federal courts have served the nation well because they are special purpose courts, designed and equipped to adjudicate small numbers of disputes involving important national interests.").

As the *Smallwood* panel recognized in denying panel rehearing, the judicially-crafted doctrine of fraudulent joinder was never intended to be anything but a "narrow exception" to the complete diversity rule. *See Smallwood v. Illinois Cent. R.R. Co.*, 352 F.3d 220, 222 (5th Cir. 2003). Unfortunately, fraudulent joinder has expanded very far beyond its proper contours, with all of the harm and waste that any such unwarranted expansion of federal judicial power entails. *See, e.g., McKee v. Kansas City S. Ry. Co.*, 358 F.3d 329, 335-37 (5th Cir. 2004) (in a suit arising from a car-train collision against a railroad company and its employees who were operating the train at the time of the accident, holding after a full trial on the merits resulting in a jury verdict for the railroad that the case had to be remanded to state court; the trial judge erroneously held that the railroad's employees were fraudulently joined because they were not negligent, an assertion that "essentially attacked McKee's case in general[,]

not the joinder of the train crew").[13]

The decision of the court below represents a valuable and long-overdue attempt to clarify the fraudulent joinder doctrine, and to confine it within its proper limits as set forth in this Court's decisions. *See Walton v. Tower Loan of Miss.*, 338 F. Supp. 2d 691, 694 n.2 (N.D. Miss. 2004) (noting that "the intent of the [en banc *Smallwood* decision] was obviously to fundamentally restate, in certain important respects, the very nature of the [fraudulent] joinder doctrine."). It is emblematic of the confusion surrounding the fraudulent joinder doctrine that even the court below, after a brief moment of clarity in *Smallwood*, has lapsed once more into loose construction of the doctrine. In the short time since the en banc *Smallwood* decision was issued, the court below has issued two decisions that conflict with *Smallwood* and the precedent of this Court upon which *Smallwood* relies, as well as with authority from sister circuits like *Boyer* and *Ritchey*. *See Rainwater v. Lamar Life Ins. Co.*, 391 F.3d 636, 638-39 (5th Cir. 2004) (holding that fraudulent joinder can be found on grounds common to diverse and non-diverse defendants provided at least one claim in a case is directed solely against a diverse defendant); *Ross v. Citifinancial, Inc.*, 344 F.3d 458, 462-67 (5th Cir. 2003), *reh'g en banc denied* (Jan. 25, 2005) (finding fraudulent joinder based on a limitations defense common to diverse and non-diverse defendants alike, as well as on the supposed legal

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13. Precisely because claims of fraudulent joinder have become the subject of extraordinarily protracted proceedings in the district courts of the Fifth Circuit, the en banc *Smallwood* court warned trial judges to limit the time and resources they devote to evaluating fraudulent joinder claims. Resolving such claims, the court instructed, "should not entail substantial hearings" and "[d]iscovery by the parties should not be allowed except on a tight judicial tether, sharply tailored to the question at hand, and only after a showing of its necessity." *Smallwood*, 385 F.3d at 574.

insufficiency of the plaintiffs' claims of fraud).[14] *See also Adams v. Duff*, 2004 WL 3103778, at **2-7 (E.D. Ky. Dec. 8, 2004) (declining to follow *Smallwood*); Note, *Fifth Circuit Establishes "Common Defense" Exception to Fraudulent Joinder Doctrine*, 118 Harv. L. Rev. 1086, 1093 (2005) (disagreeing with *Smallwood*). *Compare In re New England Mut. Life Ins. Co. Sales Practices Litig.*, 324 F. Supp. 2d 288, 299-304 (D. Mass. 2004) (following the *Smallwood* panel's decision); *Simmons v. Norfolk S. Ry. Co.*, 324 F. Supp. 2d 914, 916 (S.D. Ill. 2004) (same).

The en banc *Smallwood* decision is a much-needed step toward restoring the proper balance of authority as between federal and state courts, and toward freeing federal courts to use their limited time and resources to carry out their unique judicial role, not to serve as a spare set of state courts presiding over a never-ending stream of cases brought to a federal forum through illegitimate claims of fraudulent joinder.

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14. A petition for a writ of certiorari will be filed in *Ross*. In *Collins v. American Home Products Corp.*, a case in which under the authority of the en banc *Smallwood* decision a panel of the United States Court of Appeals for the Fifth Circuit rejected a claim of fraudulent joinder to defeat diversity, *see Collins v. American Home Prods. Corp.*, 343 F.3d 765 (5th Cir. 2003), *reh'g & reh'g en banc denied* (Oct. 4, 2004), a petition for a writ of certiorari has been docketed as *American Home Products Corp. v. Collins*, No. 04-674 (U.S. filed Nov. 12, 2004). The holding of the court below in *Ross* cannot be justified on the basis of the Ninth Circuit's decision in *Ritchey*. In contrast to California law as expounded in *Ritchey*, under Mississippi law the expiration of a Mississippi limitations period operates to extinguish substantive rights as well as to cut off any remedy. *See* Miss. Code Ann. § 15-1-3; *Proctor v. Hart*, 16 So. 595, 596 (Miss. 1895). Mississippi adheres also to the general rule that, as discussed supra at footnote 10, a defense based upon a statute of limitations is personal to the defendant entitled to plead it and cannot be set up on that person's behalf by another. *See Lewis v. Buckley*, 19 So. 197, 198 (Miss. 1895).

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 14, 2005